Supreme Court, U.S.
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No. 92-195

In the Supreme Court

OF THE
United States

October Term, 1992

ARLINGTON RAY ROBBINS,
Petitioner,
vs.
JOHN MURPHY,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private citizen is entitled to intervene, pursuant to Rule 24, Federal Rules of Civil Procedure, in a case challenging government conduct in maintaining and displaying a prominent Latin cross as violative of the No Preference Clause of the California Constitution, where the asserted interest of the proposed intervenor is that the government's removal of the cross would be an act hostile to the proposed intervenor's religion.

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Respondent John Murphy submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

The petition for a writ of certiorari seeks review of a decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of petitioner's motion to intervene.

The case in which petitioner seeks to intervene challenges, as a violation the constitutions of the State of California and the United States, the County of San Diego's use of county park land and expenditure of county funds[1] to display a thirty-six foot Latin cross at the summit of Mt. Helix. The district court held that the challenged conduct violates the No Preference Clause of the California Constitution; because of that holding, the court found it unnecessary to reach the federal constitutional issue, or the issues based on other provisions of the California Constitution. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1427 and 1438 (S.D. Cal. 1991).

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[1]Although petitioner asserts that no public funds are used to maintain the cross, the district court noted otherwise. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1423 and n.9 (S.D. Cal. 1991).

The defendants appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit, and that appeal is currently pending.

Before the district court reached its decision, petitioner moved to intervene pursuant to Fed. R. Civ. P. 24, asserting a number of purported interests in the case, including his family's enjoyment of the Mt. Helix cross and incorporation of the cross into their daily family worship; the possible decline in the value of his home if the cross is removed; his assertion that the government's removal of the cross would be hostile to his religion, in violation of his First Amendment rights; and his concern that a reverter clause in the deed conveying the park land to the County may affect continued County ownership of the park in the event that the cross is removed. The district court held that none of these asserted interests constituted a legally protectable interest permitting Robbins to intervene pursuant to Rule 24. Appendix A, Petition for a Writ of Certiorari. The district court also denied Robbins permissive

intervention, noting that such intervention would inject irrelevant issues and distract from the principal constitutional issues of the case. *Id.* at 12a-13a.

Although the district court denied Robbins' intervention motion, it did permit him to participate fully in the proceedings before the district court as *amicus curiae*, and Robbins in fact did participate fully, including arguing at length at the hearing on cross-motions for summary judgment, filing an amicus brief, and obtaining judicial notice of certain facts.

Robbins appealed the denial of his motion to intervene, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, noting that Robbins had failed to "assert an interest related to the property or transaction which is the subject of the action." Appendix C, Petition for a Writ of Certiorari. Petitioner now seeks this Court's review of the Court of Appeals' decision affirming the denial of his motion to intervene.

The facts relating to the Mt. Helix cross, and the County

of San Diego's ownership and maintenance of the cross, are set forth in detail in the district court's opinion. *Murphy v. Bilbray*, 782 F. Supp. at 1422-24 and 1430-32.[2]

REASONS FOR DENYING THE PETITION

Petitioner's petition for a writ of certiorari does not satisfy the substantive standards for this Court's review, and is premised on an illogical Establishment Clause theory that has been adopted by no court.

First, the Court of Appeals' opinion affirming the district court's denial of Robbins' motion of intervene is in accord with the consistent and uniform case law on intervention under Rule 24, Federal Rules of Civil Procedure. Thus, there is no conflict between circuit courts justifying this Court's

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[2]Although petitioner describes the park in question as a "small remote park," the district court noted that the "commanding skyline presence" of the Mt. Helix cross, illuminated every evening and discernible from a considerable distance, amplifies the 'powerful religious symbolism' of the cross." *Id.* at 1430.

review.

Second, petitioner does not properly assert any federal constitutional right. He asserts that if the County of San Diego were to remove the Mt. Helix cross from public land pursuant to a court order in the case in which he seeks to intervene, that act would be hostile to his own religion, and would violate his rights under the First Amendment of the United States Constitution. This assertion is illogical on its face, and does not confer a legally protectable interest on Robbins.

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF ROBBINS' MOTION TO INTERVENE IN ACCORDANCE WITH CONSISTENT AND UNIFORM PRECEDENT ON INTERVENTION UNDER RULE 24.

The district court's opinion denying Robbins' motion to intervene, and the Court of Appeals' decision affirming that denial, both followed consistent and uniform case law in each circuit relating to intervention pursuant to Rule 24, Federal

Rules of Civil Procedure.[3] The test for intervention reflected

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[3]*See, e.g., Williams & Humbert, Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72, 74-77 (D.C. Cir. 1988) (listing requirements for intervention and holding that allegation of trademark infringement satisfies requirement of legally protectable interest); *Caterino v. Barry*, 922 F.2d 37, 39-42 (1st Cir. 1990) (listing requirements for intervention and denying intervention due to lack of timeliness); *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96 (2nd Cir. 1990) (listing requirements for intervention and denying intervention due to lack of timeliness); *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3rd Cir.) (stating that "presumption of adequate representation generally arises when the representative is a governmental body or officer" and denying intervention due to proposed intervenor's failure to overcome such presentation), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (listing requirements for intervention and holding that environmental group has legally protectable interest because it is a party in related administrative proceeding in which defendant is also a party); *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 413-14 (5th Cir. 1991) (denying intervention because allegations of impairment by res judicata and stare decisis are not supported); *Americans United for Separation for Church and State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir. 1991) (listing requirements for intervention and granting intervention to owner of religious object at issue in Establishment Clause case); *United States v. City of Chicago*, 798 F.2d 969, 972 (7th Cir. 1986) (listing requirements for intervention and denying intervention due to lack of timeliness); *Corby Recreation v. General Elec. Co.*, 581 F.2d 175, 176 (8th Cir. 1978) (listing requirements for intervention and granting alleged property owner intervention in action brought by plaintiff, who also claimed ownership, for

in Rule 24 is straightforward, and petitioner has demonstrated no conflict in the courts of appeals that would justify the granting of his petition for writ of certiorari in this case.

The courts below properly held that none of the interests asserted by Robbins constitutes a significantly protectable legal interest in the primary litigation. *See Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir.), *cert. denied sub nom. Illinois Pro-Life*

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damages caused by fire in building complex); *California v. Tahoe Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1986) (listing requirements for intervention and denying intervention to affected landowners and to public officials in regional plan dispute because neither group satisfies interest requirement); *FDIC v. Jennings*, 816 F.2d 1488, 1491-93 (10th Cir. 1987) (analyzing interest and impairment requirements and holding that interest in negligence and breach-of-contract claims not impaired by denial of intervention); *United States v. South Fla. Water Management Dist.*, 922 F.2d 704, 707 (11th Cir.) (stating that "[t]o support intervention, a nonparty's interest must be 'direct, substantial [and] legally protectable'" and holding that farmers have legally protectable interest in water district's interpretation of water-quality standards), *cert. denied, sub nom. Western Palm Beach County Farm Bureau, Inc. v. United States*, ___ U.S. ___, 112 S.Ct. 407, 116 L.Ed.2d 356 (1991).

Coalition v. Keith, 474 U.S. 980 (1985) ("proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the law suit."); *Corby Recreation Inc. v. General Electric Co.*, 581 F.2d 175, 177 (8th Cir. 1978) (proposed intervenor must assert "'significantly protectable interest' in the primary litigation, quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

Mere "colloquial" interest in the outcome of a case is not sufficient; to allow intervention on that basis "would turn the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or have the court resolve it expeditiously)." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 532-33 (7th Cir. 1988). When Rule 24(a)(2) speaks of an "interest" it means "a legal interest, not an interest in the colloquial sense. ('I am interested in opera.')" *Id.* at 530 (citing *Donaldson v. United States*, 400 U.S. at 531). Robbins articulated only "colloquial" interests in his intervention motion; he has no legal interest in

his view of the cross from his house, in the deed's reverter clause, in the cross itself, or in any governmental decision with respect to the cross. Appendix A, Petition for a Writ of Certiorari, at 6a-11a; Appendix C at 19a-20a. Thus, his motion to intervene was properly denied.

II. ROBBINS' ASSERTION OF A VIOLATION OF HIS RIGHTS UNDER THE ESTABLISHMENT CLAUSE IS WITHOUT MERIT.

In his petition for a writ of certiorari, Robbins particularly emphasizes his claim that the remedy sought in the underlying action would be hostile to his religious preference, in violation of his rights under the Establishment Clause. This argument is illogical, and does not support a writ of certiorari in this case.

As the district court noted, with respect to the Free Exercise and the Establishment Clauses, "While there may be room for argument regarding what kinds of government conduct these causes prohibit, there is no kind of government conduct,

for example, maintenance of the cross on Mt. Helix, that these causes require.... Accordingly, petitioner's asserted constitutional interests in this action, not supported in law, are insufficient to warrant his inclusion in this lawsuit." Appendix A, Petition for a Writ of Certiorari, at 9a-10a. Obviously, if the County of San Diego's ownership and maintenance of the Mt. Helix cross violates the provisions of the California or the United States constitutions, it could not logically be argued that the constitutionally-mandated remedy itself constitutes a violation of the Constitution.

There is no authority for the proposition that a decision by the County to remove the cross, for whatever reason it might choose to do so, would violate the Establishment Clause rights of those who enjoy (but have no legal interest in) the cross. The County is under no obligation to continue to display a Latin cross on public land for the use of area Christians in their daily religious practices. Thus, Robbins possesses no cognizable legal interest in the Mt. Helix litigation arising from

the First Amendment, nor is he at risk of suffering a cognizable constitutional injury as a result of that litigation.

III. THE COURTS BELOW PROPERLY DENIED INTERVENTION BECAUSE ROBBINS' INTERESTS, IF ANY, ARE ADEQUATELY REPRESENTED BY DEFENDANTS.

When the interests of the applicant for intervention are adequately represented by existing parties, intervention is properly denied. Rule 24, Federal Rules of Civil Procedure. Robbins suggests that he can provide the perspective of a "private citizen" and Christian who is not limited by the "political and constitutional concerns" that are imposed on the governmental defendants. Petition at 15.

Since Robbins has no legally protectable interest in the case in which he seeks to intervene, adequacy of representation is not at issue. Assuming, however, that Robbins did have such an interest in the case, the representation by the defendants in that case has been vigorous, and Robbins cannot show that their representation is inadequate.

Robbins points to several ways in which his defense of the challenged County's conduct would differ from the County's approach. See Petition at 15-21. As Robbins himself notes, however, the County defendants have incorporated most of his arguments in their briefs on appeal, undermining his claim of inadequacy of representation. Other differences reflect choices in strategy and do not demonstrate inadequate representation. Indeed, the County defendants have defended the case vigorously, and there is no indication that they will not continue to do so.

Robbins implies that constitutional litigation challenging government conduct under the Establishment Clause and similar provisions of state constitutions can somehow be defended better by private citizens, who are unconstrained by "political and constitutional concerns," than by the challenged governmental bodies themselves. Neither logic nor public policy, however, support this notion that government conduct is somehow better defended by private citizens unaffected by

"political and constitutional concerns." Indeed, this view would invite private intervention in every constitutional dispute. Although there will certainly be instances in constitutional litigation when private citizens properly can assert a legally protectable interest justifying intervention, Robbins has not done so in this case, and it would be improper to permit him to intervene simply so that he can advance arguments that he believes the governmental defendants are politically or constitutionally constrained from making.

IV. ROBBINS' VIEWS WERE AMPLY EXPRESSED TO THE COURTS BELOW THROUGH HIS PARTICIPATION AS AMICUS CURIAE.

Robbins has participated fully throughout the case in which he seeks to intervene, through his status as *amicus curiae*. He filed briefs at both the district and appellate court levels. He obtained judicial notice of certain facts at the district court level, and was permitted unlimited oral argument on the cross-motions for summary judgment before the district court.

As Robbins himself notes, a number of his arguments have been adopted and advanced by the County, demonstrating the effectiveness of his participation as *amicus curiae*.[3] Thus, Robbins' participation has been extensive, and adequately served to advance his interests (albeit "colloquial") in the case.

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[3]Indeed, the only part of the proceedings in which Robbins did not participate was at oral argument before the Ninth Circuit. Given that arguments in the three consolidated cases were heard together, with only twenty minutes of argument time to be split between counsel in the three cases, the amount of time that would have been available to Robbins had he been permitted to argue would have been negligible, and Robbins had ample opportunity to participate at the appellate level through his written arguments in his amicus brief.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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